Schoolman Transportation System, Inc. d/b/a Classic Coach *and* Local 804, International Brotherhood of Teamsters, AFL–CIO. Cases 29–CA–17074, 29–CA–17183, 29–CA–17256, and 29–RC–8087

November 22, 1995

DECISION, ORDER, AND DIRECTION

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

On May 15, 1995, Administrative Law Judge Robert T. Snyder issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision* and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Schoolman Transportation System, Inc., d/b/a Classic Coach, Bohemia, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

IT IS FURTHER ORDERED that Case 29–RC–8087 is severed from Cases 29–CA–17074, 29–CA–17183, and 29–CA–17256; that the challenge to the ballot of Daniel Mullen is sustained and the challenge to the ballot of Robert Molaro is overruled; and that Case 29–RC–8087 is remanded to the Regional Director for Region 4.

*We correct an inadvertent error resulting in the repetition of pars. 11 and 12 in sec. II,C of the judge's decision.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We also find without merit the Respondent's allegations of bias on the part of the judge. On our full consideration of the record, we find no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated bias in his credibility resolutions, analysis, or discussion of the evidence.

In affirming the judge's finding that Daniel Mullen was ineligible to vote, we find it unnecessary to pass on the question whether he is a supervisor. Thus, it is unnecessary to pass on the issue whether the van and limousine drivers with whom he interacts are independent contractors or statutory employees. Rather, we find that Mullen's interests are aligned with those of management and that he does not share a community of interest with unit employees.

DIRECTION

IT IS DIRECTED that the ballot of Robert Molaro be opened and counted by the Regional Director in accordance with the Board's Rules and Regulations; that he prepare and serve on the parties a revised tally of ballots; that if the revised tally shows a majority of votes for the Union, he issue the appropriate certification of representative; and that if the revised tally does not so show, Petitioner's Objections 2, 4, and 6 shall be sustained and the Regional Director shall set aside the results of the election held February 9 and 11, 1993, and shall direct a new election.

James P. Kearns, Esq., for the General Counsel.
Martin Gringer, Esq. (Franklin & Gringer, P.C.), for the Respondent and Employer.
Gary Gordon, Esq. and *Richard Brook, Esq. (Cohen, Weiss & Simon)*, for the Charging Party and Petitioner.

DECISION

STATEMENT OF THE CASE

ROBERT T. SNYDER, Administrative Law Judge. These are consolidated cases heard in Brooklyn, New York, on February 14 through 17, and March 17 and 18, 1994. The record closed on April 6, 1994, after the Charging Union withdrew a challenge to the ballot of an alleged supervisor, Jose Rodriguez, and his ballot was opened and counted.

Cases 29–CA–17074, 29–CA–17183, and 29–CA–17256 involve charges by Local 804, International Brotherhood of Teamsters (Local 804 or the Union), against Schoolman Transportation Systems, Inc., d/b/a Classic Coach (Respondent, Classic, or Classic Coach), alleging various acts of interference, restraint, and coercion of employees exercising rights guaranteed in Section 7 of the Act, including threats to close operations, that a strike would be inevitable if the employees selected the Union as their bargaining representative, warnings to cease protected concerted activities, interrogations of their union activities, creating the impression that their union activities were being kept under surveillance, and offering benefits as an inducement to vote against union representation. These cases also allege the discriminatory reduction in seniority of employee Anthony Iuzzolino, as well as his discharge, and a series of written warnings and the discharge of employee Robert Molaro in violation of the Act. The consolidated complaint in these cases issued on May 28, 1993. In its answer, the Respondent denied the conclusionary allegations of the consolidated complaint.

Case 29–RC–8087 arises out of a representation election conducted by Region 29 of the Board on February 9 and 11, 1993, upon a petition filed by Local 804 on December 21, 1992, in a unit of all full-time and regular part-time bus drivers, mechanics, dispatchers, and assistant dispatchers employed by Respondent. Local 804 received 19 votes, 17 votes were cast against Petitioner, and there were 4 challenged ballots, sufficient in number to effect the results of the election. Petitioner filed timely objections to conduct affecting the results of the election.

In a Report on Objections and Challenges, Order Consolidating Cases and Notice of Hearing which issued June 10,

1993, the Acting Regional Director for Region 29 sustained three objections which track certain of the 8(a)(1) allegations in the consolidated complaint which were alleged to have taken place during the critical period between the filing of the petition and the date of the election, and ordered a consolidated hearing with the consolidated complaint on these objections as well as the challenges to the ballots cast by the alleged discriminatorily discharged employee Robert Molaro and alleged Supervisors Jose Rodriguez and Daniel Mullen.

At the close of hearing, the Union withdrew its challenge to the ballot cast by Jose Rodriguez, and after receiving a waiver from him, the Region opened his ballot and disclosed it had been cast against petitioner.[1] The revised tally of ballots thus shows a vote count of 19 to 18 in favor of the Union, with the two remaining challenged ballots being determinative. They shall be resolved in this Decision along with all other issues.

On the entire record, including my observation of the demeanor of the witnesses and after careful consideration of the posttrial briefs filed by each of the parties, I make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION AND LABOR RELATIONS STATUS

Respondent, a New York corporation, with its principal office and place of business located at 1600 Locust Avenue, in the Village of Bohemia, County of Suffolk, City and State of New York (theBohemia facility), has at all times material been engaged in the operation of a charter bus service. Annually, Respondent, in the course and conduct of its business operations, derives gross revenues in excess of $500,000, and purchases and receives at its Bohemia facility, products, goods, and materials valued in excess of $50,000 from other enterprises located within the State of New York, each of which other enterprises purchase and receive the said products, goods and materials directly from points outside the State of New York. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent admits, and I also find, that Local 804 is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES, OBJECTIONS AND CHALLENGES

A. *The Various Incidents of Alleged Threats, Inevitability of Strikes, Warnings, Interrogations, Promises of Benefits and Creation of the Impression of Surveillance*

These incidents may be appropriately separated into two categories; (1) conduct which preceded the filing of the petition;[2] and (2) conduct engaged in during the critical period alleged by Local 804 in its charges and the election objections referred for hearing.

1. Prepetition conduct

As earlier noted, the petition in 29–RC–8087 was filed on December 21, 1992.

As early as May 1992, a group of coach drivers met at the house of then driver, later Operations Manager James Kent, to discuss cutbacks in pay and benefits and the possibility of seeking union representation. Following this meeting, driver Jose Ramos, the most senior driver as well as the senior informal grievance representative at the time for drivers on personnel problems which arose with management, contacted Local 282 of the Teamsters. Although Ramos testified that a meeting was held with a representative of Local 282, Perry Baron, and a small group of drivers shortly after the meeting at Kent's house, it appears that this meeting was actually held early in August 1992.

As explained by driver Anthony Iuzzolino, after Ramos had made the initial call to Local 282, he followed up with subsequent conversations with Representative Baron and ultimately arranged a meeting that was held with her at the Local 282 office in Lake Success, Queens, New York, attended by himself, Ramos, and two other drivers, Sharif and Campbell. Authorization cards were distributed and signed by each of the four drivers. Immediately afterward, Iuzzolino started discussing the Union with just about every driver at various locations, including the yard at the Bohemia facility, jobsites like Atlantic City, New Jersey, while sitting in buses and eating lunch. He passed out union literature to employees and explained the Union's organizing procedure.

Ramos, as senior employee representative, along with Tom Tinsley, another driver and junior employee representative, arranged a meeting with Frank LoDestro, Respondent's senior vice president, to discuss certain cuts in benefits and salary which had recently been imposed. The meeting was held in LoDestro's office sometime in August. During it, LoDestro remarked, according to Ramos, that the two of them were involved with unionizing the drivers. Neither of the employees responded and the subject was not pursued.

Then, at the end of August, another meeting was held attended by Ramos, as employee representative, Iuozzolino, LoDestro, and Jeff Goldwasser, Respondent's General Manager. Operations Manager Jim Kent came in later but only for a brief period. The subject of the meeting was Respondent's intention to remove Iuzzolino as a full-time coach driver because of his alleged failure to be available for work on a 5-day-a-week basis. As related by Iuozzolino, after discussing his own scheduling problem, the participants went on to discuss the problems which the drivers had expressed concern about, including work schedules, job assignments, times on jobs, and salary on specific jobs. At one point, LoDestro commented that ''Everything seems to be a one-way street with you guys, you know, the company has bent over backwards for you. The company did what it can for you, and now you want to go union.'' LoDestro now said that as far as he was concerned there would never be a union. ''I'll do whatever I can to stop it.''

Then LoDestro grew very irritated, enraged and excited. He banged the table. When he did so, the cigarette he had in his mouth went flying. LoDestro picked it up and almost put it in his mouth backwards. He repeated that as far as he

[1] Counsel for General Counsel's letter dated April 7, 1994, distributed via telecopier to me and counsel advising of these events and my letter to the parties dated April 6, 1994, closing the record, are received in evidence as the administrative law judge's Exhs. 1 and 2, respectively.

[2] Prepetition conduct may not itself form the basis for setting aside the election, The *Ideal Electric & Mfg. Co*., 134 NLRB 1275 (1961) even though it may lend meaning and dimension to related postpetition conduct. See *Dresser Industries*, 231 NLRB 591 (1977).

was concerned they, the drivers, would never have a union in there. He then went on to say, ''Go ahead, bring the union in, because if I can't stop it with people I know, Bill [referring to William Schoolman, Respondent's president and owner] and I have already discussed doing away with the bus division, we won't have any more buses. We'll only have a van operation,[3] and then all you guys will be out of a job, you'll all be in the street.''

Ramos, who also testified about this meeting for General Counsel, basically corroborated Iuzzolino's testimony about LoDestro's threatening remarks, even to the extent of recalling the incident when LoDestro's banging of the table with his fist caused his cigarette to jump out of his mouth and resulted in his reinserting it in reverse. LoDestro stated there wouldn't be a union in that place, not as long as he could help it, and if he couldn't squash it, he had friends that could and he had discussed it with Schoolman and that he would shut down the coach division if he could squash the union and ''you, the employees,'' would be out the door.

During his testimony during the presentation of Respondent's defense, LoDestro admitted telling Ramos and Tinsley during a second meeting on August 31 which excluded Iuzzolino, that as long as he was in this company, ''there would never be a union here.'' I found LoDestro to be evasive, and inconsistent in his testimony, particularly as to when he first learned about the Local 804 organizing drive. In his pretrial affidavit, LoDestro denied he was aware of any employee interest in unionization until Respondent received the representation petition from Local 804 in late December 1992; denied speaking to employees about the union prior to receiving the petition; and denied ever telling employees that there would never be a union at Classic Coach or Respondent would close the bus division if a union got in. In admitting his adamant antiunion statement on August 31, LoDestro impeached himself on an issue central to the proceeding. Counsel's attempt to rehabilitate him on redirect examination failed when LoDestro attempted unsuccessfully to explain that he believed the questions about his union knowledge and statements for purposes of the affidavit related to the time frame after the filing of the petition, even though his responses in the affidavit were specifically related to the period prior to receiving the petition. I fully credit Iuzzolino and Ramos regarding LoDestro's conduct on August 31, and Iuzzolino's attendance and defense of the Union on that occasion.

According to driver Robert Molaro, after returning to Respondent's employ on October 9, 1992 as a coach operator, for the fourth time, he became active in the union campaign, which until November 17, involved Local 282. At a meeting he and Ramos attended with Local 282 organizer Baron on October 23, 1992 at the Union's office in Lake Success, the employees discussed the problems they were having and were given literature and authorization cards to distribute. Starting the next day, Molaro discussed the Union with other drivers before work, in Atlantic City, and after work. He handed out union literature to 10 or 11 drivers and talked in all to 10 to 15 employees. He distributed and got employee signatures on 10 or 11 cards.

On November 2, when he came in to the facility, Jim Kent told him that LoDestro wanted to see him. Molaro went into his office, sat down and asked LoDestro what was wrong or what he wanted. LoDestro said ''I see you have been stirring up trouble talking to the guys out in the yard.'' Molaro asked what he meant, LoDestro responded, ''I hope you are not doing the wrong thing.'' Molaro said he wasn't doing anything wrong. LoDestro told Molaro to go back to work and that he didn't want to hear it again. During this exchange LoDestro appeared angry.

About 8 days later, Molaro was in the front of the shop talking to the mechanic about the bus and the mechanic happened to mention to him that LoDestro was really angry at him about union activity. With this state of mind, Molaro saw LoDestro approaching where he was standing. The mechanic left. Molaro took the occasion to say, ''I thought we straightened this out last week.'' LoDestro responded, ''You are still fucking lying to me.'' Molaro replied, ''No, I'm not,'' and LoDestro walked away.

When LoDestro was asked on his direct examination about Molaro's attributing to him the comment about accusing Molaro of stirring up trouble talking to guys in the yard, he responded ''I believe that was the original discussion that we had in my office and at the, in the garage.'' (Tr. 843.) LoDestro went on to explain that discussion as a reprimand of Molaro for disrupting the mechanics from doing their work, and disrupting the girls from doing their work, and spreading a rumor to Kent about taking over his job and that he, LoDestro approved it. But none of those conversations were claimed by LoDestro to have taken place in the yard. Conversations with the mechanics would have been in the garage, and conversations with the girls, reservationists, or Kent would have taken place in the office. Thus, LoDestro's explanation does not accord with his own claim that Molaro was interfering with other employees and is not believable and is evasive in avoiding a direct answer. LoDestro later agreed that the ''yard'' refers to the employee parking area outside the building where Molaro was engaged, from time to time, in soliciting employees for the Union before and after work. It was only significantly later, during his redirect examination that LoDestro now changed his response to the initial question and for the first time denied directly telling Molaro not to talk to coach drivers in the yard. (Tr. 953.) Molaro is fully credited in his attributing the warning about stirring up trouble in the yard to LoDestro and LoDestro's later angry accusation that Molaro had not heeded his warning. It is evident that LoDestro's remarks related to his knowledge of Molaro's union solicitations and desire to make Molaro aware of this knowledge, to interrogate him regarding this activity and to implicitly warn him to cease such activity.

LoDestro's August 31 statements to Ramos and Tinsley constitute threats to close the bus operation and to oppose union organization at all cost in violation of Section 8(a)(1) of the Act. *Athens Disposal Co.*, 315 NLRB 87 (1994). LoDestro's later November 2 and 10 interrogations of Molaro and veiled warnings to cease his union activity are also violative of Section 8(a)(1). *Foamex*, 315 NLRB 858 (1994).

[3] As will be described in greater detail, infra, Respondent operates a van operation providing door-to-door service to the airports as well as a limousine service for airport transport and private hire with a separate group of drivers, as well as the bus division whose employees are involved in this consolidated proceeding.

2. Conduct during the critical period

Coach Driver Edward LaPetina testified that on the morning of January 2 or 3, 1993, he was on the steps of his assigned coach cleaning it, while on standby waiting for a possible assignment. LoDestro approached him and asked, ''Ed, what do you think about what is going on.'' LaPetina asked what he meant by that. LoDestro replied, ''Well, about this union business.'' LaPetina said he thought it was a good thing happening which would ''give us like some kind of stability as far as pay cuts and firings go and stuff like that.'' LoDestro responded, ''Well, what is to stop me from firing guys now and just hiring 12 guys.'' LaPetina told him, ''At least 95 pecent of the drivers give you their all. You hire 12 guys now all you are going to be is abstracts, and that's all, I am going to show you how they drive.'' LaPetina's reference to abstracts was to the driving record, including violations which Classic Coach obtains from the State Motor Vehicle Bureau on new applicants for employment. LaPetina went on, ''that [abstracts] is all you would have, because right now you know the drivers you have, you know the customers want them back, they are good drivers.''

After LaPetina denied, under further questioning, that the union organizing was motivated by a desire for additional money, LoDestro started cursing, referring to ''you fucking guys, what do you think the union is going to do for you, they are not going to do a fucking thing for you. I give you whatever you want, I give you, you know.'' At some point as the conversation continued, LaPetina was called away to handle an overload and went to work.

LaPetina's testimony was direct and straightforward and is credited. LoDestro admitted a conversation of short duration with LaPetina at his bus about what the Company has given as opposed to what the Union would provide, but could not recall if he said anything about the Company firing and replacing drivers, but really didn't think he had. LoDestro, previously discredited, is not credited here as well.

About 2 weeks before the election, William Schoolman, Respondent's president and sole owner, took LaPetina into Jeff Goldwasser's office, closed the door, and accused him of trying to steal his money. When LaPetina replied ''I don't steal anybody's money,'' Schoolman told him to ''lower your voice or I will slap you'' and repeated this when LaPetina expressed incredulity. The accusation had to do with a claim LaPetina had made for overtime on an overnight trip to Niagara Falls when he had to stay out until 3:30 a.m. after the customer explained he had Classic Coach's approval for the extra time. As LaPetina explained to Schoolman, this matter had been discussed previously with LoDestro and Goldwasser who had denied guaranteeing the time to the customer but who had absolved LaPetina of wrongdoing. In referring to LoDestro, LaPetina used the expression ''Mr. Frank.'' Schoolman asked if LaPetina was ''trying to make a fucking joke out of this.'' LaPetina didn't know what he meant. Schoolman said ''by calling us Mr. Frank and Mr. Bill.'' Schoolman next said he had heard LaPetina had told LoDestro that the Company wouldn't last 2 weeks without the drivers. In all likelihood this is a reference to the earlier conversation at which LoDestro had threatened and interrogated LaPetina. LaPetina denied he ever said that. Schoolman added that a driver had come in and told them that he, LaPetina, could withstand a strike because his ''wife works.'' When LaPetina asked who said that, Schoolman did not reply.

Schoolman then went on to ask LaPetina to tell him what really was the gripe of the men. Before LaPetina could reply, Schoolman said ''Let's go into my office.'' Once there, Schoolman said ''Let's not speak here,'' and took LaPetina to a room in the garage, but then left saying he needed pen and paper and returned shortly with them. They both sat a table. Schoolman asked, ''Why are the guys doing this, and added, I heard that you were getting the guys to do this.'' LaPetina said, ''They are all grown men, they got minds of their own. I can't make them do anything they don't want to do.'' Schoolman now said, ''Well tell me what the problems are.'' LaPetina replied, ''It had to do with vacation, it had to do with us paying money in Atlantic City for parking, us paying a percentage of the tolls, losing money going past exit 68, Airport, transfers or shuttles.'' As LaPetina described the problems, Schoolman was writing them down. Schoolman said, ''Well, I can't give you anything, because it is illegal for me to give you anything to vote no, but if you can read between the lines, I don't want to lose you as a driver, maybe we can do this amongst ourselves.'' LaPetina said, ''Why don't you just call a meeting, tell the guys what you are telling me.'' Schoolman said, ''We can do that.'' LaPetina asked, ''Who would you like at the meeting, Joe Ramos or Tom Tinsley.'' Schoolman said ''anybody but Tony Iuzzolino, because Tony is a hot head and all he does is yell and scream.''

On another occasion, in early February, a few days before the election, LaPetina had returned to the facility early from a merge with another driver and after seeking, unsuccessfully, to get petty cash, he got in his car to drive home. As he started up his car, Schoolman came out into the yard, knocked on the window, and after preliminary salutations and greetings were exchanged, Schoolman said, ''You can put a stop to this now.'' LaPetina replied, ''I don't understand what you are telling me. Schoolman said Ed, it is getting out of hand, and you can put a stop to it now.'' And then he left and went to the other employee's car and LaPetina went home. LaPetina related this entreaty to Schoolman's earlier conversation with him when Schoolman blamed him for making the other employees become involved with the Union.

Jose Ramos testified that one evening, approximately 4 weeks before the election, while he was fueling up his bus, Schoolman came into the bus, sat down and started asking questions, and after Ramos finished fueling and parked, Schoolman remained and they continued to talk with Schoolman asking questions regarding what was going on with the Union. Schoolman asked why he got into this situation, meaning the organizing campaign and representation election. Ramos said it all started ''when you had Mr. Weintraub come in here and pollute your mind with all these things about saying drivers are a dime a dozen. That's when everybody tried to unionize because after Weintraub was there all the cuts began. That's when it all began going down hill. The Company used to be decent with us.'' (Weintraub was an efficiency expert who was hired by Classic Coach as a consultant.)

According to Ramos, after being refreshed from a review of his pretrial affidavit, he recalled that Schoolman had mentioned during this conversation that he had had some prior

experience with unions with limousines. Ramos was firm that it was Schoolman who had first raised the subject of unionization.

Tony Iuzzolino testified that on a Saturday, February 6, 1993, a few days before the election was held, he was in the lobby of the facility making his picks of assignments for the following week, when Schoolman walked in. After exchanging pleasantries, Schoolman asked if Tony had gotten the letter that was sent out. This was a reference to a piece of company antiunion literature dated February 5, addressed to its employees, consisting of three pages and containing a full-sized cartoon of a figure representing an out-of-work hobo or bum standing in front of a small cooking fire and railroad tracks with the inscription ''But Local 804 Got in and Did to Classic Coach What They Did to U.P.S. VOTE NO. Vote for Classic Coach on February 9th or on February 11th !!'' On the third page of the letter, Schoolman described Teamsters Local 804 as being a strike happy, violent group and notes:

> Remember what Local 804 did to UPS. Their 20 year span of constant strikes *at every contract renewal* plus their wildcat strikes made UPS noncompetitive and allowed Federal Express to take over. *Is this what we want for Classic Coach*? In this highly competitive position would mean *less work, less money and possible layoffs for you*!

Iuzzolino replied that he hadn't received it. Schoolman said, ''It's very informative. You should read it.'' He said ''Let me make you a copy.'' Tony said ''fine,'' Schoolman then said ''I'd like to sit down and have a man-to-man talk with you, if you don't mind'' and asked if he had the time. Tony said ''yes.'' After Schoolman dictated a letter in his office and provided a copy of the Company's February 5 letter for Tony to read, they held a conversation standing just outside Schoolman's office.

As related by Iuzzolino, they talked about the Union and the employees deciding to go with the Union. Schoolman said, ''You know, you're a smart guy. You've been in business. You understand the problems that a business man has today. We have a tremendous amount of problems in the coach business. There's a lot of competition on Long Island and we've done the things we have for various reasons. We had to cut back, we had to do this.'' Iuzzolino expressed criticism that the way the cutbacks were implemented they created a lot of ill feelings. A lot of it could have been avoided. They then talked about communication problems between the drivers and the Company and Schoolman's desire to rectify the problems.

Schoolman then spoke about the Union. He said, ''You know, Tony, if you vote in a union here, if you vote in Local 804 there's going to be a strike.'' Iuzzolino replied, ''Why do you say that, nobody wants a strike, neither the Company nor the Union.'' Schoolman said he was very familiar with 804 from when he was with UPS. ''That's a very violent union. They have a long history of strikes and violence, and there will be a strike.'' Tony disagreed, saying nobody is going to benefit from a strike.

Schoolman then said, ''Tony, what can I say to you to get you to vote no.'' Iuzzolino looked at him, smiled and shrugged his shoulders. Schoolman repeated his question and Iuzzolino repeated his unspoken reaction. Schoolman then waved his hands at Tony and with a smile on his face said ''your a yes vote. I have that feeling.'' Iuzzolino now said ''Really, well, you never know.''

Schoolman also asked Iuzzolino if he was on the organizing committee. Tony said no. He also asked Iuzzolino about a prounion letter sent out on the campaign describing what the Union could do for the men and what the Company would try to do. Iuzzolino denied that he was responsible and didn't know who was.

At this point a driver, Andy Cilla, walked in and Schoolman looked at him and said, ''Andy, the only guy who I know is going to vote no,'' to which Andy responded, ''yes,'' he would vote no. Andy went on to describe why he felt a union couldn't help the employees. Schoolman asked Iuzzolino if he intended to attend the meeting the next day at Classic. Tony asked ''Would it benefit us, financially, as drivers?'' and Schoolman said yes. The discussion ended with Schoolman again asking Tony to attend and to read the letter. Iuzzolino had another commitment and did not attend the meeting.

Schoolman agreed he took LaPetina into Jeff Goldwasser's office, objected to LaPetina's calling him and the managers Mr. Bill, Mr. Frank, and Mr. Jeff and said, ''One of these days someone is going to slap you when you when you talk so disrespectfully,'' but denied he threatened to slap LaPetina. Schoolman also denied he got a pad to write down grievances but admitted he grabbed a yellow pad and pencil. He also denied he asked what the grievances were, ever referred to Iuzzolino disparagingly, or that he made a veiled promise of benefits because that was not the way he spoke, he was very blunt. As to the statement at LaPetina's car, Schoolman believed he thought he asked if LaPetina had any questions because he was following the same format in speaking to employees and following an outline he had prepared. He had the impression that LaPetina favored the Union, having told Schoolman the issue had nothing to do with money, but everything to do with representation.

I am convinced that Schoolman made the statements attributed to him by LaPetina, and that because of the strength of his antiunion sentiments and convictions, he made an effort with a number of employees, including LaPetina, to bring out their deepest feeling about the union campaign, using whatever information he had about them, such as the stories Schoolman had obtained about LaPetina's alleged involvement in solicitations and his willingness to withstand a strike, to press them about their union sentiments. In the course of doing so, Schoolman unlawfully interrogated LaPetina, unlawfully created the impression his union activities were being kept under surveillance, and unlawfully directed LaPetina to have other employees cease their prounion conduct and activity.

Schoolman denied that he asked Ramos ''what do you guys want or what are your grievances.'' Yet, Schoolman admitted confronting Ramos in his bus late in the evening with the comment, inter alia, that ''it was my understanding that you found those arrangements [when Frank LoDestro met with Ramos and Tinsley last August] and those give backs by Frank acceptable and now we've been served with a petition.'' (Tr. 1193.) In essence, Schoolman was indeed pressing Ramos to explain or account for the current organizing campaign. It is also significant to note that while Schoolman

claimed he tried to stay close to his outline prepared for his union-related discussions with employees, he also noted that some people could get hot when discussing such matters and anybody could say the wrong thing. Such interrogation exceeds permissible bounds and violates the Act. *Foamex*, cited supra. Ramos is credited on his version of the interchange and conversation that evening.

Schoolman acknowledged buttonholing Iuzzolino on Saturday morning, February 6 at the facility and getting the employee to agree to talk about the issues in the campaign, but denied stating there would be a strike if Local 804 got in, asking what he could say to get Tony to vote no, asking if the employee was on the union organizing committee or responsible for issuing a particular union letter, or calling him a ''yes'' vote and Cilla a ''no'' vote. Indeed, Schoolman denied having any knowledge of Iuzzolino's union sentiments on February 6, yet Respondent was aware since at least the end of August when he defended unions and expressed the employees' need for union representation to Vice President LoDestro, that Iuzzolino was an outspoken union advocate. It would have been logical for such a strong defender of the status quo as Schoolman to seek to convert Iuzzolino in the strongest terms possible, including embellishing on the language in his February 5th letter to employees by guaranteeing a strike if Local 804 became the drivers' representative, to feel him out on what would get him to change his mind, and to confront Iuzzolino with rumors as to his union participation. Iuzzolino's more comprehensive, straightforward, and detailed narrative of the conversation that morning is credited. The conduct in which Schoolman engaged that morning constitutes a series of violations of Section 8(a)(1) of the Act, including unlawful interrogation, unlawfully threatening that a strike would be inevitable if the employees selected the Union as their collective-bargaining representative, offering unspecified benefits as an inducement to vote against representation by the Union as the upcoming election to be conducted by the Board, and creating the impression among employees that their Union activities were being kept under surveillance. *Foamex*, supra; *Gem Urethane Corp*., 284 NLRB 1349 (1987); *Metropolitan Life Insurance Co*., 256 NLRB 626, 633 (1981). These numerous incidents of unlawful restraint and coercion of employee rights under Section 7 of the Act constitute as well valid objections to conduct affecting the results of the election, which, if my determination of the challenges show the Union did not achieve a majority of valid ballots cast in the election, should result in my recommending that the election be set aside and a rerun election be ordered to be held. *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962). LoDestro and Schoolman were the top executives and the owner of the Company and their coercive questioning, threats, and statements designed to unlawfully undermine employee support for Local 804 carried the weight of authority of their managerial positions. Their coercive activity directed to a senior employee and representative, Ramos, and to two other known union activists, LaPetina and Iuzzolino, could be expected to be disseminated widely among unit employees. The extremely intimidating nature of their remarks, following and related to LoDestro's threat to close the coach operation made outside the critical period, satisfy the legal standard for establishing their substantial interference with the laboratory conditions which the Board has established to govern the electoral process.

B. *The Discharge of Employee Robert Molaro and His Challenged Ballot*

Robert Molaro first worked for Classic Coach as a coach operator in 1985. Thereafter he worked off and on until October 9, 1992, when he returned to Respondent's employ for the fourth and last time. In the Spring of 1992 when Molaro was living in Florida, Respondent supplied him with a positive reference. By letter dated April 23, 1992 on Classic Coach letterhead, addressed ''To Whom It May Concern,'' General Manager Goldwasser wrote that ''Robert Molaro has been employed as a motorcoach driver at Classic Coach for a period of six years. I find Robert to be a trustworthy and reliable individual, Classic Coach often received requests from customers for Robert to drive on special charter jobs. I would recommend him for any position, either driving or in a supervisory capacity. We would welcome his return at any time.''

Molaro's union activities on his return have been previously briefly summarized, as well as LoDestro's pointed accusations to Molaro's stirring up trouble and his later foul mouthed censure of Molaro for lying that he had ceased stirring up trouble, i.e. his organizing activities.

At a union meeting held on November 17, called by Baron of Local 282, and attended by representatives of Local 804, as well as Baron, Ramos, Iuzzolino, Molaro, and another employee, it was disclosed that because of too many commitments or contracts expiring, Local 804 would take over the Classic Coach organizing effort. Molaro, Ramos, and Iuzzolino signed Local 804 combination membership and authorization cards at this meeting. By letter dated December 2, 1992, Tony Magrene, Local 804 trustee/business Agent, forwarded Local 804 signup cards to Molaro to distribute to other employees. Over the week-and-a-half following his receipt of these cards on December 3, Molaro, along with Ramos and Iuzzolino, distributed the cards and solicited signatures. Molaro signed up one employee in the lobby of the facility, three in the yard, and others while they were in Atlantic City. He also distributed union literature to at least a dozen employees during this period of time. Between November 17 and December 3, Molaro named 10 separate employees whom he solicited for the Union. One of them, Dwayne Johnson, later refused to sign an 804 authorization card when Molaro started distributing them on and after December 3 to most of these same employees. To some who asked, he explained the reason that 804 was now succeeding 282 in the organizing drive.

On December 16, 1992, Molaro received a message from Kent to call the office, that Frank and Jeff wanted to see him. He arrived back at the facility at 1 p.m. He went to Jeff Goldwasser's office and asked him what was up, and Goldwasser told him as of today, this date, you are terminated. Molaro asked what for, and Goldwasser said ''It's not working out between you and Classic Coach.'' Molaro asked, ''What did I do wrong.'' Goldwasser said he didn't ''want to discuss it, it's not working out.'' Goldwasser did produce a rule book and pointed to an involuntary termination clause or something and said ''this is what your getting discharged under.'' Molaro looked at it and said ''it's a poor reason to discharge somebody'' and walked out. He then walked into Frank LoDestro's office and asked Frank what was up and he said, ''Your terminated.'' Molaro said ''what for'' and he said ''it's not working out.'' Molaro

pressed him as to what he did wrong and LoDestro said ''we don't care to discuss it,'' and Molaro left the office.

Molaro was later asked to turn in his petty cash. On the next day, Thursday, December 17, 1992, payday, Molaro returned to the facility, to pick up his paycheck from the previous week and to turn in his recap sheet showing assignments and travel the last week. He also turned in his petty cash at that time. Jim Kent asked him, do you want your money now, is it a large check you are getting now. Molaro said no, it was only a merge and a standby and then Atlantic City. He said he could wait until next week.

Molaro explained that the recap sheet is a report that the driver fills out of what work he did in a particular week. On it the driver records what jobs he did, what buses he used, where he went, the time he went, and the time he returned from a trip and the amount of payment due for the trip. Molaro filled in the information at the beginning of the week when he received his assignments, and then recorded any changes in assignments that occurred during the week. He then handed the sheet in after the payroll week ended on a Thursday. Supervisor Jim Kent corroborated that the drivers usually turn in these sheets at the end of the week, and had until Monday to do so. Since he had no assignments that Thursday, having been fired the day before, he handed it in on Thursday, December 17.

The following week, on Christmas Eve, December 24, Molaro returned to the facility to receive his last week's paycheck. Kent came out into the lobby with his check. Molaro noticed he was a day's pay short. He hadn't received pay for the last day he worked, Sunday, December 13, when he was on standby but was called in to go to Atlantic City with a bus when somebody else's assigned bus broke down. He went to Atlantic City and came back late Sunday night or early Monday morning. He told Kent he was short, Kent said he would talk to Linda, the payroll clerk, to see if he could get him the pay. Two minutes later Schoolman came out with his check. He told Molaro if he wanted to get paid for that ''fucking day, get a fucking lawyer and get off my property now. I am going to call the fucking police.'' Molaro took his check and went out the door. LoDestro also yelled at him to get off the ''fucking property now.'' A few days later Molaro received a check for his December 13 Atlantic City trip by certified mail. Molaro acknowledged having made a mistake on his recap sheet. On his sheet he had listed his original assignment of a trip to Atlantic City for Saturday, December 12. He did this when he saw the assignment on the board. In fact, he did not go to Atlantic City on Saturday. He merged at exit 32 on the Long Island Expressway. When there aren't enough passengers on two buses, whether of the same or different companies, both scheduled for the same destination, the passengers would be merged onto one bus, and the other bus, in this case Molaro's, would return to the facility and later return to the merge location to pick them up when the passengers return from Atlantic City. The bus driver would be informed of the merge and its location by the dispatcher. The pay for a merge was $80 and for a round trip to Atlantic City was $140. Molaro failed to enter the merge on his recap sheet because it slipped his mind. He just didn't think of it.

Molaro's last payroll week ran from Friday, December 11 to Thursday, December 17. The assignments for that week were posted on late Monday, December 7 or Tuesday, December 8, after the unit drivers had an opportunity to pick assignments from a posted bid sheet from the prior Friday or Saturday until Monday, December 7. Molaro filled out his recap sheet on either Tuesday or Wednesday, December 8 or 9.

In its answer to the complaint, Respondent had admitted subparagraphs 14(a), (b), and (c) in which the Regional Director had alleged as 8(a)(1) violations that on November 5, 11, and 23, 1992, respectively, Respondent had placed written warnings in Molaro's personnel file. Those warnings, as well as a fourth, were introduced into evidence by counsel for General Counsel. They each contain handwriting on a printed Employee Warning Notice form. The first, with a date of warning of November 5, 1992, describes an incident of the same date, ''Bob Molaro told by Vice-President Frank LoDestro about disrupting office and garage area. He is constantly wandering throughout the building.'' The action to be taken is a warning with the consequence of a suspension if the incident should occur again. The place for employee signature acknowledging having read and understood the notice is blank. The supervisor signing is Jeffrey Goldwasser and the date for signing is November 5. The second, is dated November 11, and recounts an incident of the same date in which ''Driver had radar Detector in vehicle.'' Again there is no employee signature but there is Goldwassers with a date of November 11. The third warning notice is dated November 25 and lists as an incident on November 23, ''Operator of Bus Somehow Caused Driver of Car to Attack Vehicle, 2nd incident like this where damage was caused, 11/15/91 1st Incident Took Place.'' Under the heading, Action to be taken if incident occurs again. Under the heading, Action to be taken if incident occurs again the writer wrote, ''Dismissal—driver is accountable for vehicle.'' Again, there is no employee signature but there is Goldwasser's on November 25. The fourth warning notice is actually a record of Molero's dismissal and records ''Just not working out during his 3-month period of probation.'' There is no employee signature and Goldwasser is listed as signing on December 16.

It was not until the fourth day of the hearing after General Counsel had rested his case-in-chief that Respondent counsel moved for the first time to dismiss the allegations in subparagraph 14(a), (b), and (c) on the ground that there was no evidence that the written warnings were placed in the personnel file on the dates alleged. When reminded that Respondent had admitted these allegations in its answer, Respondent counsel now sought to amend its answer. He admitted further that these alleged warnings were not written on the dates indicated at all, and were not placed in the personnel file until after the filing of the unfair labor practice charge alleging Molaro's discriminatory discharge. The Molaro charge was filed on February 26, 1993. They were written to assist the Company in defending the charges. Thus, these four documents did not exist at the time Molaro was discharged. I denied the motion to amend the answer.

Jeffrey Goldwasser testified that he did, indeed, write the warnings after Molaro was discharged. Respondent's labor attorney at the time asked him to write them. Goldwasser's testimony at the hearing contradicts his pretrial affidavit in which he swears that on November 5, November 11, and November 25 he wrote warning notices not shown to Molaro. Although admitting these sworn statements were not true, Goldwasser permitted them to be included in his affidavit

which he read and then executed. Goldwasser's testimony was impeached by this major and glaring contradiction, and, particularly by Goldwassers failure to admit to the Board agent the circumstances surrounding the creation of the ''warning notices.'' Goldwasser even testified that he used the warning notice forms so they would look more official.

Thus, when Goldwasser for example wrote on the November 5 warning notice that ''Driver will be suspended'' and when he wrote on the November 25 notice ''Dismissal—Driver is accountable for vehicle'' Molaro had already been fired. Significantly, on the fourth warning, documenting Molaro's dismissal, nothing is said about the error on Molaro's last recap sheet.

Goldwasser also swore in his affidavit that ''The Company used a memo dated 12–12–91 that radar detectors were not allowed and their use would carry a 2-day suspension. Molaro was the only person I know of caught with a radar detector.'' Yet, Molaro was not suspended for his alleged infraction. Neither was he given a written warning notice.

Molaro testified on direct examination, as to the bus damage incident. In November 1992, he was driving a Classic Coach bus in Manhattan, when a car cut in front of him. He blew the horn and the horn stuck. The driver of the car stopped, got out, came back and punched the door on the bus, breaking the glass in the door. Molaro completed a company incident report on the matter. He was not disciplined nor given a warning notice and recalls no conversation about it. About a year before that incident, another driver had cut in front of Molaro on the road. He went ahead and stopped short again. Molaro in his bus went to go around the car and the driver stopped, got out and started kicking the headlights, and broke the mirror. Molaro drove off into a parking lot to get away and the driver followed, with baseball bat and proceeded to smash everything on the bus. He understood the Company was going to press criminal charges against the perpetrator, but he finally paid for the damages. Molaro was not disciplined over the incident and either Frank or Jeff made a joke about it, mentioning putting a sign on the bus that said ''hit me.'' With respect to neither incident did Molaro intentionally provoke the attack. Neither did the earlier incident prevent Respondent from providing the reference letter or later reemploying him.

Molaro denied being reprimanded or spoken to about speaking with coworkers. On one occasion, around October 2, Molaro saw Jeff Goldwasser and Linda, the payroll clerk, together in a diner and mentioned it later to a mechanic. Later, Goldwasser accused him of starting rumors that he was sleeping with Linda.

On another occasion, Molaro came into work and had carried a radar detector he used in his car, to a seat of his bus, because his car, a stationwagon, did not have a covered storage area. He was going to stow it in his bag which he had also carried to the bus. Goldwasser saw the detector and asked what he was doing with it. Molaro explained he was going to put it in his bag because he didn't want to leave it in his car. He was not disciplined or warned over the incident.

On cross-examination, Molaro acknowledged a posted company rule prohibiting radar detectors on buses. He was also refreshed from his own pretrial affidavit that on December 17 Kent came back and told him Linda couldn't find his toll receipts, but to return the following week to receive his pay for the Sunday, December 13 Atlantic City run.

As to the error on his recap sheet, although he mentioned a merge to Kent on December 17, he had not noticed the error—the failure to change the December 12 Atlantic City trip when he handed in the sheet, folded. Neither did he notice the error on Sunday December 13, when he added that trip to his sheet, which previously listed standby. While Molaro agreed he had been placed at the bottom of the seniority list when he returned from Florida in October 1992, he disputes he was ever told he was being placed on probation as a new employee. After starting in 1985, Molaro left the Company voluntarily in 1987, returned at the end of 1988, worked for almost a year and left again and returned in 1991, left again at the end of February, 1992, and then came back for the fourth time in October, 1992. His leavings were caused by problems in caring for a son while working Classic Coach irregular hours, and once, entering the bus business.

Molaro acknowledged receiving $5000 from Local 804 over a period of time in 10 separate payments once or twice a week starting in January, 1993. The arrangement arose when Molaro was asked to do some paperwork, including sorting and filing, which he performed both at home and in the Union's office. Later testimony, established that Molaro was also involved in continued solicitations of coach drivers for the Union up to the election held in February 1993. Molaro's payment arrangement has not influenced in any way my judgment regarding his credibility as a witness in this proceeding which I find to be generally good and which echoes Goldwasser's own written evaluation of Molaro's trustworthiness and reliability.

While Molaro had testified earlier he had not been reprimanded for annoying other employees, and had only talked to the mechanics when he had a problem on his bus, he did acknowledge that LoDestro expressed annoyance with his talking to the mechanic in the shop and told him to get out when he was there describing a mechanical problem with his bus and even changed his testimony to admit that he talked to mechanics about other matters both inside and outside the shop. I do not deem this conflict sufficiently serious to warrant discrediting Molaro's testimony on the salient features of his testimony regarding the outstanding nature of his union activity and the Company's failure to follow its own progressive discipline rules by either warning or disciplining him on the occasion of his infractions enumerated. Respondent's Employee Handbook dated, issued, and distributed to employees starting in April 1992 provides for a system of constructive discipline designed to provide an opportunity for employees to explain and improve their performance and calls for progressively more serious measures, running from counseling, to written warnings, to suspension to termination. None of these procedures were followed in Molaro's case, and, in fact, a record was fraudulently created to appear to match the policy, although without Respondent having provided Molaro with any notice or opportunity to improve his conduct. I also find that, in accordance with Molaro's account, he turned in his last recap sheet on December 17, the day after he was fired. LoDestro's and Goldwasser's accounts to the contrary, coming from witnesses whose veracity has been impeached, are not credited. Nonetheless, I will

examine the merits of Respondent's claim that the recap sheet error was the trigger for Molaro's discharge.

Concerning the mistake on Molaro's recap sheet, other government witnesses minimized its importance and confirmed that such mistakes made by others never resulted in discipline. Joseph San Felipo, operations manager from March 1990, to March 1991, testified that the recap sheets, which she called salary recap sheets, although an aid in preparing payroll, were not as accurate as the daily schedules which she prepared of driver assignments for posting because at times the men forgot to record changes on them and even failed to hand them in—they were supposed to be submitted on Friday—and she could not depend on them in preparing payroll. In her training, in fact, she wasn't told to use them to prepare payroll. Although in her view not done intentionally, drivers would fail to remove a trip from a sheet although canceled. San Felipo was in contact each morning with the dispatchers, even on Sunday when she would call in, to learn if a merge took place or a trip was otherwise cancelled so as to update her own paperwork derived from the daily schedules in order to prepare a proper payroll. An independent check on whether the driver actually performed an assignment, such as a trip to Atlantic City, was the presence of toll receipts. If they were not turned in by the driver, there was no basis for issuing pay for that trip.

According to San Felipo, drivers several times failed to change an Atlantic City line run on their sheets to a merge and, while she was employed as manager, were not disciplined. San Felipo is credited.

Another General Counsel witness, Frances Merkle, was first hired as a reservationist in October 1989, but later transferred in May 1991, to act as assistant to the Coach operations manager, returned to the reservation department in June 1992, as supervisor of reservationists and was terminated in February 1993, after having words with Dan Mullin, head dispatcher at the time, about the illegibility of her handwriting. Merkle testified that during the period of almost a year she worked in coach operation a couple of drivers a week—ultimately, almost every driver—made mistakes in their recap sheets. These included failing to list a merge, discrepancies regarding claims for overtime pay on night touring (recall the matter involving driver LaPetina), or on a charter exceeding 6 hours' stay in Atlantic City, and when changes were instituted in the $40 standby pay, eliminating it altogether if the driver received a driving assignment before a certain hour in the morning. In Merkle's estimation, these discrepancies were ''no big deal'' and she would correct them if she caught them on the sheet. On occasion, Linda, the bookkeeper, would come to her saying she had no toll receipts and asking if a driver did a merge, and Merkle would check the dispatch sheet line counts prepared by the dispatcher on duty when there was a merge, to determine if there was a merge. The driver who had submitted the recap sheet was not contacted about the discrepancy. Merkle could not recall any discipline for these errors. She would know if there had been a suspension of a driver because Goldwasser would have to inform her so she didn't schedule the driver for any work.

Merkle also testified that once Frank LoDestro called her into his office and told her not to talk about the Union. One of the drivers had accused her of doing that. On another occasion, in either December 1992 or January 1993, while working in the dispatch office with the dispatcher, Kenny Giordano, LoDestro pointed to a coach driver's list of names and phone numbers posted on a closet door, said ''do you want to know who are the union organizers,'' and pointed to some names, Eddie LaPetina, Tony luzzolino, and Rich Christiano. She also thought he pointed to Bob Molaro's name but was not 100 percent sure. Merkle asked him how he knew and he said because they ''were Italian and Italians are union organizers.''

During her cross-examination, Merkle said the drivers list LoDestro referred to was at least 6-months old and had no date on it. Merkle believes she typed up the list during her year in the Coach Department. Her stay there overlapped Molaro's third period of employment by many months in 1991. Neither a February 22, 1992 nor a June 20, 1992 drivers seniority list contains Molaro's name. These facts do not preclude the Company from having retained on a closet door an older, undated list. In Merkle's March 1993 affidavit she states LoDestro mentioned four drivers on a list, but could only recall three, not including Molaro. At the time, she didn't fully concentrate and was nervous about going to the Regional Office. More recently, after devoting more thinking to the matter, she now believes the fourth name mentioned might have been Bob's.

LoDestro's denial of a conversation with Merkle as to who was leading a union drive is not credited. I also find that Merkle's obvious frankness in her inability to positively and beyond a doubt identify the fourth employee to whom LoDestro referred in December or January, lends weight to Molaro's identification as that fourth employee. I also credit Merkle's testimony generally as to her handling of recap sheets and errors on them.

A third witness, LaPetina, also testified that errors on the recap sheet were not treated seriously. On a few occasions he put in for a particular amount on a trip to New York City which was probably incorrect, but knew that if the sum he submitted was determined to be incorrect by Linda, in accounting, he would just not get the pay he listed but a lesser sum. He never was disciplined for these claims being disallowed. La Petina, previously credited on his interchanges with Classic Coach officials, is likewise credited here.

LoDestro testified about meeting with Molaro in October to advise him to stop annoying people in the shop and in the bus operations rooms and in spreading a rumor he was going to a particular school to take over Kent's job. At this point in his testimony LoDestro denied knowledge of Molaro's union activities and expressed regret for having given Molaro a loan of a car; if he had thought Molaro had been a union activist maybe he wouldn't have loaned the car. Shortly afterward LoDestro saw Molaro at the shop entrance and told him he was playing games, he was lying that he wasn't annoying people in the shop because ''this time I caught him.'' LoDestro did not include this second conversation in his affidavit because the Board agent did not ask him about it, a decidedly weak explanation which I reject. LoDestro has been previously discredited on this testimony; LoDestro's earlier claim that this was the conversation to which Molaro referred when attributing to LoDestro the accusation about stirring up trouble in the yard has been rejected. Molaro has admitted being told to leave the shop by LoDestro but this direction never resulted in a reprimand or written warning, until Re-

spondent fictionalized an account after Molaro's discharge and the filing of the Union's charge on his behalf.

LoDestro's lack of credibility was demonstrated anew when after describing one employee, Moses Hargrove, coming to him before the election to voice his support for the Union even though ''the Company treated him good,'' LoDestro now admitted having specific knowledge of other employees' support of the Union before the election, naming Ramos, LaPetina, and Molaro in this regard. When then asked how he was aware of Molaro's involvement, LoDestro immediately contradicted his prior acknowledgment by answering ''I just assumed everybody that was there was involved in the Union. No particular or factual information that they were.'' (Tr. 851.) He added he also could not remember anything that Ramos and LaPetina said or did which gave him such knowledge. Ramos' and LaPetina's credited testimony describing their unlawful interrogations and coercion by Schoolman have been previously described. LoDestro would have clearly been privy to the contents of those conversations. LoDestro's direct coercive conduct toward both LaPetina in January 1993, and Ramos at the end of August 1992, have also been summarized.

LoDestro acknowledged bringing Molaro back four times and considering him an excellent driver. LoDestro also claimed to have discussed the radar detector incident as well as the recap sheet error with Goldwasser ''some time prior to'' Molaro's discharge in December. (Tr. 856.) He, Goldwasser, and Schoolman all participated in a joint meeting at which the decision was made to fire Molaro. They probably discussed the falsification of the recap sheet the same day or the day before the firing. He is sure he saw it before Molaro was fired. To LoDestro the falsification of the sheet was the main reason for firing Molaro. Without it, he probably would not have fired Molaro. LoDestro agreed that he would not have fired Molaro a month earlier for talking to employees in the shop when he did not even give him a written warning. Yet, LoDestro agreed that in rehiring Molaro four times he didn't think Molaro was dishonest. It is also significant that LoDestro did not refer to the bus damage incidents in discussing the reasons for discharging Molaro. LoDestro insisted, also, in spite of the foregoing, that it was his position that a driver who makes a mistake on a recap sheet should be terminated without even being asked what the nature of the mistake was. In fact, he agreed Molaro was not asked before being fired. He deemed the mistake as equivalent to stealing from the Company. Yet, in another inconsistent response LoDestro, who admitted ignorance of the recap sheets and their completion by drivers, reluctantly agreed that it was possible for mistakes to be made on them. I also discount LoDestro's further assertion that the sheets are very important documents because ''that's how they get paid.'' (Tr. 936.)

As further evidence of the Company's hostility toward Molaro's union activity, on January 18, 1993, Schoolman circulated a letter to Respondent's employees in which, inter alia, he gave two reasons as to why the Teamsters were going after it, the second being ''Bob Molaro wants to be Shop Steward.'' In stressing this rumor which it had received from other drivers, Classic Coach was manifesting a special concern, even an obsession with, the union adherence of a driver it had recently fired, a concern and obsession which I conclude largely motivated its conduct toward him some weeks prior on December 16, 1992, the day of his discharge.

Goldwasser evidenced his animosity toward Molaro by testifying that, finally, after the salary recap incident, ''I decided that enough was enough.'' He consulted with Frank LoDestro, ''I said I finally had it; I finally have a recap sheet that is falsified on Bob Molaro and considering the past incidents we have had with him, this was it.'' (Tr. 989.) Goldwasser later asserted that Molaro's presence annoyed him. After reviewing notes, which Goldwasser admitted were not retained in Molaro's file, although he first swore they were in Molaro's file, he prepared the ''warning notices'' sometime in early January. The Union's initial charge alleging Molaro's unlawful discharge was filed on December 28, 1992.

Goldwasser has previously been thoroughly discredited as a witness. I do not credit his description of the first bus incident as an attack by a bunch of kids, or that Molaro had his radar detector already hooked up in the dashboard of his bus. Goldwasser described having seen Molaro's last recap sheet on Jim Kent's desk on Wednesday, December 16, and knew right away that the Saturday Atlantic City trip was a merge. In seizing on the recap sheet error, Goldwasser, in agreement with LoDestro, expressed the view that none of the earlier infractions had risen to the level of seriousness which were sufficient to trigger even a written warning. Thus, it was the recap sheet incident which alone warranted termination. These responses magnify the fraud Goldwasser perpetrated by crafting the bogus warning notices. Furthermore, while Goldwasser never personally saw another mistake on these recap sheets, his experience, even if believed, which I do not, does not undermine the experience of the three witnesses who testified to the contrary. And even Goldwasser testified, in agreement with two of them, that sometimes the sheets turned in are blank as to rate and that the line run sheets prepared daily by the dispatchers provide the last word on a merge or other change in assignments. I also do not credit Goldwasser that he only learned about Local 804 when it filed a petition, and that he had only heard a lot of rumors previously about Local 282.

Schoolman has been previously discredited. Although he considered Molaro's bus incidents serious matters, even after the second one he failed to take any action against Molaro. He claims to have been talked out of it by LoDestro who told him ''you can't deny a guy a livelihood because he has an accident.'' Schoolman also noted Molaro's skills as a driver and that customers made requests for him. Schoolman also acknowledged receiving partial restitution for the $2600 damage done on the first incident after having the two youthful perpetrators arrested.

Schoolman also readily admitted his strong antipathy to having a union represent the coach drivers, and, in particular, Local 804, and he wanted to make that intention very clear.

Based on the foregoing, I conclude that counsel for the General Counsel has made a prima facie showing that Molaro's exercise of the rights protected by Section 7 of the Act was a substantial or motivating factor in his discharge. See *NLRB v. Transportation Management Corp*., 461 U.S. 393, 400 (1983). I further conclude that Classic Coach has been unable to show by a preponderance of the evidence, that it would have discharged Molaro even in the absence of his protected conduct. *Wright Line*, 251 NLRB 1083 (1980),

affd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982).

Respondent's antiunion animus shown towards Local 804 and, in particular towards Molaro's protected activity, is well documented on this record. So is company knowledge of Molaro's union involvement, based on LoDestro's interrogation of him, apart from Merkle's recollection of LoDestro's probable inclusion of Molaro among those few employees, of Italian extraction, including Iuzzolino who were instrumental in leading the union campaign. There is also sufficient evidence in the record, contrary to Respondent's argument at pages 12–13 of its brief, from which to draw the inference that Molaro's union solicitations in the company parking area, or yard, were viewed by LoDestro, at least, among other company managers, even apart from the evidence of LoDestro's direct questioning of Molaro's conduct in the yard. There is also little question that in terms of timing, Respondent terminated Molaro within days of his Section 7 conduct in soliciting cards for and distributing literature for Local 804 on and after December 3, when he received the material from the Union. Respondent acted precipitately against Molaro without prior warning, without following its own written disciplinary policy, and without providing him with any rationale for his discharge. Even the main, in all likelihood, the sole ground upon which Respondent relies for his discharge was not in existence on the day of his discharge and thus shows its pretextual nature. Even if Respondent had Molaro's recap sheet in its possession on December 16, the credible weight of the evidence establishes that Molaro's mistake was not a recognized or warranted basis for discharge, much less for less severe discipline. Respondent's fraudulent attempt to construct a disciplinary history for Molaro compounds its discriminatory motive. Accordingly, I conclude that Molaro was discharged in violation of Section 8(a)(3) and (1) of the Act, and I will recommend that his discharge be remedied and his challenged ballot be opened and counted.

C. *The Discharge of Employee Anthony Iuzzolino*

Iuzzolino's participation in the end of August 1992 meeting at which he defended and supported union representation against LoDestro's antiunion diatribe has been recounted. So, too, has LoDestro's later fingering of Iuzzolino as one of the few union ringleadlers among employees, as well as Schoolman's February 6 coercive interrogation of Iuzzolino, his confrontation as to Iuzzolino's Union activities, and unlawful threat that a strike would ensue if the union achieved bargaining status. Later testimony will show that on the second day of the representation election, on February 11, Schoolman saw Iuzzolino in the company of union representatives at a local diner.

Iuzzolino began employment as a part-timer in July, 1989, becoming a full-time coach driver in June, 1991. After an August 4, 1992 meeting he attended at Local 282's office, Iuzzolino discussed the union with drivers at several locations, in the yard, at jobsites, sitting in buses, and eating lunch. He passed out union literature to 6 or 7 employees. He attended the November 17 meeting with Local 804, and afterward, discussed the Union with probably every driver and got signed authorization cards from a few of them.

In January 1993, he learned that his seniority had been reduced, and he had been given a new starting date of December 14, 1992. As a result, he lost extra seniority pay he had previously received in certain jobs and 5 accrued sick days. He also lost 2 weeks' vacation pay per year. He learned all this not from management, but from the bookkeeper Linda when he complained about a shortage in his pay. The change in seniority date apparently did not adversely affect his seniority for purposes of bidding weekly on posted jobs, which were assigned in order of seniority, except for a limited opportunity to receive assignments at the specific request of customers.

The day, February 6, a Saturday, when Schoolman had met privately with Iuzzolino to vent his antiunion views, because of a snow storm, Iuzzolino had arrived late and lost his assigned job to a standy, Andy Cilla. When Schoolman approached him, Iuzzolino was picking his assignments for the following week running from Friday, February 12, to Thursday, February 18, off the posted bid sheet and placing his picks on a posted pick sheet. He picked work assignments for every day that week, including multiple alternate jobs for each day. For each day he also listed as an alternative, an Atlantic City run.

The evening of February 6, Jim Kent called Iuzzolino's home and left a message with his wife to call him. Iuzzolino returned the call to Kent's home telephone number; Kent asked him if he was going to attend the meeting scheduled for the next night at Classic Coach. Iuzzolino said he had spoken to Mr. Schoolman about it that day, Kent said yes, he, Schoolman, just wanted him to call everyone to remind them and ''see if you're going to attend and get as many people as you can.'' Iuzzolino told Kent that he might not be able to attend, and, in fact, did not.

From Sunday, February 7, to Thursday, February 11, 1993, Iuzzolino was not scheduled for any driving assignments. After Saturday, February 6, the next time he appeared at the facility was on February 11, when he voted in the election. On that occasion, Iuzzolino also noted his weekly schedule for the workweek starting the following day. He was scheduled off for Friday, February 12 and Saturday, February 13, was assigned standby for Sunday and Monday, February 14 and 15, was assigned an airport run on Tuesday, February 16 and a Nassau job on Wednesday, February 17, and standby on Thursday, February 18. On standby the driver is obligated to come in to the facility at 5:30 a.m. and stay until 9:30 p.m. in case he is needed. He was paid $40 for this. A driver could also receive an assignment of on call, where he stays at home, but is ready to report for a driving assignment if needed, for which he is paid $20. A driver can also receive a scheduled day off, as Iuzzolino did on February 12 and 13.

When Iuzzolino arrived at the facility early in the morning of February 11 he was in the lobby, talking with two employees when Jim Kent walked out of the office, threw two pairs of pants and a vest on the counter, and confirmed they had been sitting inside for Iuzzolino. These were new company uniforms which were being issued to the coach drivers. Later in the morning Iuzzolino heard from another driver, Lenny Ungar, that Kent wanted to see him, but that Kent was not in his office then. Twenty minutes later, when Ungar went back into the office to see Linda, the bookkeeper, he asked Ungar to ask Kent when he wanted to see him. Iuzzolino now learned from Unger that Kent did not want to see him then, because he had to talk to someone first.

After voting in the election on February 11, Iuzzolino went into his car and pulled it around to talk with Bob Molaro and union business agent Tony Magrene who were also sitting in a car parked off the property. After a while, when the morning voting hours concluded, Iuzzolino joined with Molaro, LaPetina, Magrene, and another union agent, Joe DiFazio, in going to the Airport Diner for breakfast. As they sat together and waited for their orders, William Schoolman walked in, placed an outgoing order and saw Iuzzolino together with the union agents and a few employees.

Iuzzolino then returned to the facility and waited around off and on the parking lot for the outcome of the voting and the results of the election. During this period Iuzzolino saw Kent again about 30 feet away as he walked to his car, went back inside, and then walked out again to go to lunch. On neither occasion did they speak with each other.

On Friday, February 12, Iuzzolino called the facility to see if he was still on standby for Sunday, February 14, or had been moved up to a job. He asked for Kent or Goldwasser but both were gone, apparently having left because it was snowing. The next day, Saturday, February 13, he telephoned the company, got Maureen, one of the reservationist who answers the phones, and asked her if he was still on standby the next day. She checked the posted sheet and told him he was not, she saw his name had been crossed out and standby had been assigned to a driver junior in seniority to him. Iuzzolino then asked her to check for Monday when he had also been assigned standby. Maureen told him he had been taken off Monday also. He asked her what was going on. She didn't know. Iuzzolino said he was going to call Jim Kent right then.

Iuzzolino then telephoned Kent at home. His wife answered and Iuzzolino asked for Jim Kent. She said, ''Will you please hold on?'' and he heard Kent in the background say ''If its a driver I don't want to speak to him.'' She asked Iuzzolino who was calling and he identified himself. Iuzzolino heard Kent's wife tell him ''It's Tony Iuzzolino'' and Kent responded, ''Oh, we're trying to get rid of him. Tell him I can't talk to him now, call me Monday.'' When Mrs. Kent got back on the phone, she told Iuzzolino that Kent couldn't come to the phone and ''He'll call you back.'' to make sure he called. Iuzzolino said, ''Please make sure he does, it's very important. I have to speak to him tonight.'' She said she would, asked for his telephone number, and Iuzzolino gave it to her. Iuzzolino did not receive a return call from Kent.

On Monday, February 15, Iuzzolino telephoned the facility at around 4 p.m. Ruth, the receptionist, put him through to Jim Kent's extension, where it kept ringing, then went back to her. Iuzzolino did not leave a message, but instead, after 5 p.m. called the dispatcher, Roy, and asked him to check the sheet for him. Iuzzolino now learned that his name had been removed from the Tuesday, February 16 assignment. He told Roy he didn't know what was going on, he had now been taken off 3 days, and Roy said, ''I don't know what to tell you.''

On Tuesday evening, February 16, Iuzzolino went in to the facility to check the sheet and saw that he had been taken off the rest of the week. Iuzzolino now decided to try to handle his removals by telephone. He next tried to call in to the facility on Thursday, February 18, did not reach Kent but left a message he had called and hadn't heard from him. He then received a call from Molaro who had learned from Tom Tinsley that he had been terminated because the Company could not get in touch with him.

The next day, Friday February 19, Iuzzolino telephoned and reached Kent from Local 804's offices. He asked Kent what his assignments were. Kent said 'Who is this, Tony Iuzzolino, you're looking for work? Iuzzolino said, ''Yes, why not.'' Kent said, ''You got to be kidding.'' Iuzzolino asked, ''What do you mean?'' Kent said, ''You no longer work here. You've been terminated.'' Iuzzolino asked why. He said, ''Because we haven't been able to get a hold of you, get in touch with you.'' Iuzzolino asked, ''Why would you want to get in touch with me?'' Kent said, ''Well, you never called in to confirm about your jobs.'' Iuzzolino said to him, ''Why should I call in, I was already assigned work.'' Kent said, ''Well, we tried to get a hold of you.'' Iuzzolino asked ''Why did you change my work? Why was I required to call in, is this new company policy, that when we are assigned a job and we're assigned work that we have to call in?'' He said, ''We never had to in the past, why do we have to now?'' Kent didn't respond. Iuzzolino now asked why he was taken off of work for the whole week. Kent said, ''Because we couldn't get in touch with you.'' Again, Iuzzolino asked, ''Why did we have to have contact if I knew my assigned work?'' and, again, Kent didn't answer. Kent finally said, ''You'll have to take it up with Jeff'' when Iuzzolino asked to get back on the sheet and to work.

Iuzzolino now said ''Let me ask you another question. I called you the other night. You called me at home to remind me of a meeting and I called you at your house and asked for you to return a phone call, and you didn't have the courtesy to return that phone call.'' Kent asked, ''What phone call?'' Iuzzolino now explained and repeated what he heard Kent say about the Company trying to get rid of him. Kent denied saying that and Iuzzolino replied, ''Well, okay, I'm hearing things.'' Kent now said, ''When I'm home I don't answer the phone.'' Iuzzolino said, ''Oh really, from what I understand Classic is a 24-hour-a-day, seven day a week operation and its your job as Operations Manager to be available if a problem arises.'' Kent repeated he didn't make himself available at home. Iuzzolino asked, ''Then why did you call me at home the other day and asked my wife to have me return your phone call if you don't answer that at home?'' Kent did not answer.

Iuzzolino next called Goldwasser who repeated that ''We couldn't get hold of you,'' and confirmed he was terminated. Goldwasser said Kent was on vacation, and ''when he returns we'll have to discuss it.'' As explained by Iuzzolino, Goldwasser also failed to explain to him why, if he had a set schedule he was supposed to do, he should have called. Iuzzolino was not therefore called back to work or offered any work. Iuzzolino had also noticed several occasions in the last couple of months of his employment when he observed drivers with less seniority being assigned jobs for which he had picked.

Counsel for General Counsel, now on motion granted, amended the date of Iuzzolino's discharge to February 14, the first date he was denied work, rather than the original date alleged of February 19, when Iuzzolino learned for the first time he had been terminated.

On cross-examination, Iuzzolino was shown a handwritten notice which read as follows:

> 12-4-94
>
> TO—ALL DRIVER'S—
>
> When you have a day off you must check in with the office on that day, to find out if there are any changes in the schedule for your next day's work
>
> Do not rely on the day's that you have written down, because there can be changes, if I do not call you by 4PM call me & I will let you know what the changes are if any.
>
> Jimmie ''K''

Iuzzolino recalled seeing it before, most likely on one occasion, but could not remember seeing it posted for any extended period of time.

As to the matter of his failure to make picks for the workweek starting Friday, February 19, Iuzzolino had explained in earlier testimony he had given in an unemployment insurance hearing that he had purposely not gone into Classic Coach. He knew they were taking him off work and he was trying to avoid a confrontation like what happened to Bob Molaro. Iuzzolino also added testimony in this proceeding that he didn't pick assignments for the week commencing February 19, because he had a habit of only picking when he was at the facility working and at the time and dates he would have picked, work was being taken away from him. It is also apparent that by Saturday, February 13, when Iuzzolino already knew assignments had been removed and he telephoned Kent at home and inadvertently learned that the Company was trying to get rid of him, Iuzzolino could have reasonably concluded he was already fired and further picking would have been futile.

The consequence of the August 31, 1992 meeting involving his status as a full-time employee was the issuance to Iuzzolino of a written 3-day suspension which Iuzzolino acknowledged and signed for not reporting for work. The issue had been raised when Iuzzolino and Ramos had sought a meeting at the time to discuss what Iuzzolino described as a scheduling dispute. Iuzzolino had an assignment on August 28 from which he did not return until about 1:30 a.m. on August 29. On his return he learned he had been assigned to a trip that day at 6:30 a.m. He informed the dispatcher that he had prior obligations, was scheduled off that day, and DOT regulations mandated additional time off. Through the dispatcher he learned that Jeff Goldwasser had told him that he had to work, but Goldwasser would not speak directly with him. Iuzzolino did not report for work on August 29 and then learned on August 30 and 31 that he had been removed from assignments each of those days. It was then he and Ramos arranged to meet with management about the matter.

During his cross-examination, Respondent also developed evidence showing that Iuzzolino had owned on August 31, 1992 a Ticketmaster outlet on Long Island, located in a video store which he had owned until May, 1991. However, while continuing to operate the outlet until he also sold it at the end of 1992 to the individuals who had purchased the video store, Iuzzolino spent very few hours there. He had an arrangement with the new store owners to have his old employee, now employed by the new owners, tend to the ticketmaster computer, in his absence and that of his son, who helped him in the operation, until they purchased the outlet.

During his cross-examination, Iuzzolino expanded on his learning in December 1992, of the Company's decision to reduce him to part-time status. Shortly before December 14, he had a telephone conversation with Jim Kent. Kent told him the Company wanted to take away his seniority, take him off the full-time list because he wasn't giving them enough days work. Iuzzolino told him although he picked 5, 6, and 7 days a week to work, he was never assigned 5, 6, or 7 days to work. He was always assigned less. On many occasions there were men junior to himself who received more work than he did. Iuzzolino said the way to prove it is to take out the pick sheets. He had requested this on several prior occasions. Kent referred him to Goldwasser. With Goldwasser, Iuzzolino also defended his picking plenty of days to work but not being assigned those days. Again, Iuzzolino said it can be proven by examining the pick sheets. Goldwasser equivocated and Iuzzolino arranged to meet LoDestro accompanied by Ramos and Tinsley. At this meeting LoDestro also referred to and scanned records showing Iuzzolino's receiving weekly assignments of 1, 2 or 3 days. Iuzzolino's protest that the Company should examine the pick sheets was again avoided while an argument ensued about whether Iuzzolino purposely picked jobs he knew he would not get and Iuzzolino, supported by Tinsley, vigorously disputed this contention. Respondent refused to modify its position and Iuzzolino's change in seniority date to December 14, 1992, was confirmed, while he continued to receive work based on his same seniority slot of number 13. As a consequence, Iuzzolino lost extra seniority pay, vacation, and sick leave.

Frank LoDestro testified that after he had concluded his meeting with Ramos and Tinsley on August 31, during which he agreed to try to restore some of the moneys the employees had lost, he thought the union problems had been worked out and told this to Goldwasser and Schoolman. LoDestro later added that on August 31, Ramos told him he would be quite satisfied without a union if certain changes were made.

At the December 14 meeting with Iuzzolino, Ramos, Tinsley, and Goldwasser, he accepted Iuzzolino's promise to be available 5 days a week and made the decision to restore Iuzzolino to full-time benefits but he was overruled by Schoolman. This, of course, is disputed by Iuzzolino, who is credited, who says he was not successful in convincing LoDestro to restore his status. In fact, because of an oversight, a decision made on August 31 to reduce Iuzzolino's status had not been implemented. Accounting had never been informed.

As to Iuzzolino's discharge, LoDestro had left the matter up to Goldwasser. Apparently, Iuzzolino's work habits were suspect. LoDestro didn't know ''specifically'' but Iuzzolino ''never called in for a period of time, they couldn't get a hold of him, and decided he didn't want to work there.''

Goldwasser testified that at the August 31 meeting it had been left up to him to decide on Iuzzolino's discipline, and he had decided on the 3-day suspension. As to his firing, he had heard Jim Kent complain for a week about Iuzzolino and finally told Kent enough is enough, lets finish with him. His assignments for the week of February 12 to 19 had been re-

moved when they had not heard from him, first by Friday, February 12, and then by Tuesday, February 16. Goldwasser decided he would be terminated when he didn't make picks for the following week by Tuesday or Wednesday, February 16 or 17.

Although Goldwasser insisted that most of the drivers called in on their days off, he finally could name only 8 drivers out of 20 on the seniority list who did so. When shown the pick sheets for the weeks ending February 18 and 4 Goldwasser agreed that Iuzzolino had picked assignments for 13 of the 14 days. The evidence also showed that for the week ending January 28, 1993, Iuzzolino made picks for all 7 days of the week. The Respondent failed to produce a pick sheet for the week ending February 11, 1993, although subpoenaed.

As to the notice to drivers to call in on their days off, it had been placed in the individual drivers' mail boxes. It had not been prepared on official letterhead and was not referred to in the employee handbook as formal company policy. A glass bulletin board where the notice could have been protected from being removed or destroyed, was not installed until January 1993.

While Respondent produced dispatch sheets for 13 dates between August and December 1992, where Iuzzolino's name appears crossed out and in certain instances, another name has been substituted, it is unclear what led to each of these changes. Respondent claimed they were removals of assignments for failing to call in or not showing up. Iuzzolino in rebbutal testimony disputed this contention, referring to diary entries showing he was scheduled off on certain of these days for which he had made picks and was not assigned, and was on call at home on others, was ill on still others, and was 15 minutes late for a charter run on one occasion. Two of the days were at the end of August, when Iuzzolino's name was removed for failure to take the early morning run on August 29 as previously related.

Jim Kent acknowledged that he had signed the December 4, 1992 notice. He also had provided Iuzzolino with new replacement uniforms, pants, and vest on February 11, that the Company was distributing to drivers at the time in their individual sizes. Kent had wanted to talk with Iuzzolino before he left that day about his not picking jobs. He later acknowledged seeing Iuzzolino outside the facility in a car or truck but did not talk with him because it was Iuzzolino's duty to come in to see him, he wasn't going to chase him. He hadn't seen him since February 5 or 6. The next time they spoke was on February 19 when he told Iuzzolino he was no longer employed, that he had abandoned his job. Kent confirmed there were no assignments without making picks in writing or calling in.

On cross-examination, Kent now insisted that on February 11, the second day of the election, Iuzzolino had not yet made his picks for the following week. He had the pick sheet and the dates opposite Iuzzolino's name was blank. As Kent related Iuzzolino had to fill in his picks by Monday, February 8. As earlier described, Iuzzolino had made picks for every day that week, the pick sheet itself for February 12 to 19 having been received in evidence. Kent's erroneous and extremely damaging testimony had first been related at Iuzzolino's unemployment hearing where he had testified that Iuzzolino was discharged because he did not bid for jobs for the week of February 12 to 18.

Kent claimed at one point he had five telephone lines right at his desk which he used to receive incoming calls from drivers off on a particular day to check their assignments for the following day. Later, this changed to two lines, with three of them with the reservationists next door. Kent also agreed that he did not keep a running list of drivers who had to call in. Furthermore, it appeared that not all drivers were obligated to call. If they knew they were going to work the following day then they would work. Kent made a distinction here between less and more dependable drivers. Neither did the rule apply to part-timers who work weekends. If a driver didn't call in and there was a change in assignments affecting him, and Kent couldn't contact the driver, the driver usually did show up and receive his assignment. If there was a change in assignment, for example, and the driver didn't show up, Kent had a standby driver ready to take the assignment, and a back up driver on call at home. If the change was a cancellation of an assignment the only inconvenience was to the assigned driver who hadn't called but who showed up. That driver might also have had the option of bumping another driver lower in seniority whose assignment had not been cancelled. Thus, there was no impact or effect on operations as a result of the cancellation. The new handwritten December 4 rule was designed to obtain calls from drivers on their days off on a more regular basis.

As to recap sheets, Kent agreed with Molaro and other witnesses that they were invariably turned in from Thursday at the end of a workweek until the following Monday.

Schoolman readily admitted seeing Iuzzolino seated at a table together with Union Agents Magrene and DeFazio and a few other employees the morning of February 11 at the Airport diner. In spite of this admission Schoolman insisted that when he discussed Iuzzolino's termination with LoDistro or Goldwasser, he was unaware of any union activity on his part. This of course, also flies in the face of the credited testimony regarding company knowledge of Iuzzolino's union advocacy dating at least from August 31, 1992.

Schoolman also confirmed LoDistro's testimony that he had overruled the restoration of Iuzzolino's full-time seniority status when he learned from accounting his benefits had never been removed since August 31. Rather than relying on LaDestro's advise he told him he wanted to check out the facts and learned that Iuzzolino's work record since September had shown he had not been giving the Company 5 to 7 days a week. Schoolman claimed in testimony I do not credit that when he made this decision in mid-December he was unaware that Iuzzolino had engaged in any union activities.

Schoolman also changed his testimony, waivering on his earlier firm recollection that Iuzzolino was at the diner with union agents and two other employees, with a recollection that ''I think'' Iuzzolino was there, but ''I'm not positive. There were a bunch of guys.'' At this point, Schoolman commenced fencing with union counsel, and sought to lessen the impact of this unambiguous evidence of knowledge immediately prior to Iuzzolino's discharge by claiming that the union was buying breakfast for everyone and he was surprised more employees weren't present.

Employee LaPetina credibly confirmed Iuzzolino's account that he does not call in on days he is scheduled off and has never been disciplined for having failed to do so. Just like Iuzzolino, LaPetina keeps a diary record of daily assignments and report times which he records from the posted master

pick sheet and daily worksheet. On the two or three occasions there have been schedule changes in the day following a day off, he has been called from the office. He has also been called by Goldwasser to come in on his day off when a special need has arisen caused by an emergency shutdown of the Long Island Railroad. Neither had LaPetina every seen the Respondent's handwritten notice advising employees to call in on their days off.

Schoolman testified he was surprised when he got the petition from Local 804 shortly after December 21, 1992. While there had been rumors of organizing earlier, he was led to believe that the driver's problems had been resolved as a result of LoDestro's August 31 meeting with Ramos and Tinsley. These responses contradict the credited evidence of LoDestro's November interrogation of Molaro, August 31 threats to employees as well as other evidence of his knowledge of union activity well before the filing of the petition. Surely Schoolman was privy to LoDestro's information and Respondent's unlawful responses to the Union's organizing drive were coordinated and an approved management response.

The hostility which Schoolman exhibited to Local 804's campaign in the Company's preelection literature as well as his testimony was matched by the hostility Schoolman manifested to the ''hot head'' Iuzzolino and to his leading union role. In my judgment the clincher for Respondent was Iuzzolino's open association with union agents at the Airport Diner on February 11 on a day that proved inconclusive for the fulfillment of Schoolman and Respondent's strong desire to defeat the Union. The Union's bid for representation rights was going to continue and would be litigated. A strong union advocate who sided with the Union at every turn in spite of all of Respondent's attempts at intimidation was still leading the union faction among employees. Respondent's discipline of Iuzzolino in belatedly and without notice or opportunity to be consulted, changing his seniority date in a clear act of retaliation effected by Schoolman just 2 days before Molaro's unlawful termination, was not effective to stem Iuzzolino's union activity. In a blatant attempt to manufacture a valid ground for discharge, Respondent removed Iuzzolino's assignments even 2 days in advance of his asserted obligation to call, and in spite of his contacts with Respondent's facility. Finally, Iuzzolino learned the true nature of Respondent's scheme for him when he overheard Kent not only refuse to take his call, in spite of his earlier willingness to receive Iuzzolino's call at his home to seek his attendance for the antiunion campaign speech by Schoolman, but he now heard Kent surreptitiously inform his wife that Respondent was seeking to terminate him. Iuzzolino's fears were well grounded and his good-faith efforts to contact Respondent to comply with its policies and seek to retain his picked assignments were to no avail. I conclude that Respondent seized on a supposed but not established breach in a company policy, selectively, and therefore arbitrarily, enforced, under circumstances which it created to establish falsely that Iuzzolino had failed to comply, to rid itself of a strong union advocate. The sham nature of Respondent's defense to the charge is established finally through Kent's fraudulent claim that Iuzzolino had failed to pick assignments for his last week when documentary evidence produced from Respondent's own file prove to the contrary. I conclude that Counsel for General Counsel has made a prima facie showing that Iuzzolino's protected conduct was a motivating factor in his reduction of seniority and his discharge, and Respondent has failed to establish that it would have taken such action even in the absence of such activity.

D. *The Issue of Danny Mullen's Status as Supervisor and Challenge to His Ballot*

A party seeking to exclude an individual from voting for a collective-bargaining representative has the burden of establishing that that individual is ineligible to vote. *Ohio Masonic Home*, 295 NLRB 390, 393 (1989); *Golden Fan Inn*, 281 NLRB 226, 229–230 fn. 12 (1986). In representational hearings, the burden of proving supervisory status is on the party alleging that such status exists. *Ohio Masonic Home*, supra; *Tuscon Gas & Electric Co*., 241 NLRB 181 (1979). If the evidence of supervisory authority is inconclusive, the Board has held that the party urging the supervisory exclusion has not met its burden. *Ohio Masonic Home*, supra at 393, fn. 7.

The record here demonstrates that the charging party has sufficiently demonstrated that Danny Mullen was a supervisor within the meaning of Section 2(11) of the Act, which defines a supervisor as:

> . . . any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The Union's challenge is based on Mullen's relationship to nonunit personnel such as van and limousine drivers, reservationists, and dispatchers, but not to job duties which he performs in relation to the direction of coach drivers. (P. Br. at 7, fn. 4.)

The authority to exercise supervisory acts makes an individual a supervisor even if such acts apply to non-bargaining unit employees. *Detroit College of Business*, 296 NLRB 318, 321 (1989). In *Detroit College of Business*, the Board held that:

> [T]o ascertain whether an individual's exercise of supervisory authority over employees outside the unit warrants his exclusion as a supervisor, we must make a complete examination of all the factors present to determine the nature of the individual's alliance with management.

Relevant factors to be considered include, but are not limited to, the business of the employer, the duties of the individuals exercising supervisory authority and those of the bargaining unit employees, the particular supervisory functions being exercised, the degree of control being exercised over the nonunit employees, and the relative amount of interest the individuals at issue have in furthering the policies of the employer as opposed to those of the bargaining unit in which they would be included. Id.

From the evidence set forth in the record, it is clear that Mullen was so allied with management as to establish a dif-

ferentiation between him and other employees in the unit. Mullen interviewed nonunit van and limousine applicants, made hiring recommendations by and large followed by management, made disciplinary judgments as to van and limousine drivers, authorized leaves of absence and assignments of overtime for reservationists, and arranged work schedule switches and vacation requests for dispatchers. For purposes of determining whether Mullen was a supervisor, it does not matter that the individuals that he exercised authority over were not part of the bargaining unit. *Detroit College of Business*, supra at 321. Furthermore, Mullen's relationship with Fran Merkle presents another aspect of his close alignment with management. Merkle, a supervisor herself at the time of the relevant events, in October or November, 1992, was informed by LoDestro that Mullen was her supervisor and was going to be assuming some of LoDestro's responsibilities. According to Merkle's credited testimony, Mullen fired her after he expressed dissatisfaction with the illegibility of her handwriting on company documents. The foregoing conduct, while not establishing an idicia of supervisory authority with respect to rank and file employees, is important nonetheless in showing the degree of Mullen's alignment with management's interests and responsibilities as opposed to employee interests and is a factor in establishing Mullen's ineligibility to vote in the representation election. See *Albertson's Inc*., 307 NLRB 787, 795 (1992) and *Toyota of Berkely*, 306 NLRB 893 (1992).

As to the van and limousine drivers, Respondent argues that since they were independent contractors, and not statutory employees, any authority which Mullen had over them is irrelevant with respect to a determination of his supervisory status over the bargaining unit. (R. Br. at 34–35.) The Union, however, believes that the van and limousine drivers are nonbargaining unit employees. In deciding whether Mullen was a supervisor or a statutory employee under the Act at the time of the election, and thus ineligible to vote, a determination must be made as to the working status of the van and limousine drivers.

The principal issue then is whether the van and limousine drivers were independent contractors or company employees, and who has the burden of proving so. The Union has amply met its burden of establishing that Mullen possessed supervisory authority. Since Respondent raised the defense that even if Mullen was a supervisor, he was a supervisor of independent contractors, and not of nonbargaining unit employees, Respondent should now have the burden of proving such status.

Section 2(3) of the Act excludes from the definition of employee ''any individual having the status of an independent contractor.'' In determining whether individuals are employees or independent contractors, the Board applies the common law of agency, specifically the ''right-of-control'' test set forth in *News Syndicate Co*., 164 NLRB 422, 423–24 (1967).

> Where the one for whom the services are performed retains the right to control the manner and means by which the result is to be accomplished, the relationship is one of employment; while, on the other hand, where control is reserved only as to the result sought, the relationship is that of an independent contractor. The resolution of this question depends on the facts of each case, and no one factor is determinative.

There are many factors considered significant under the ''right-of-control'' test: (1) whether individuals perform functions that are an essential part of the company's normal operation or operate an independent business; (2) whether they have a permanent working relationship with the company which will ordinarily continue as long as performance is satisfactory; (3) whether they do business in the company's name with assistance and guidance from company personnel; (4) whether the agreement which contains the terms and conditions under which they operate is promulgated and changed unilaterally by the company; (5) whether they account to the company for the funds they collect under a regular reporting procedure prescribed by the company; (6) whether particular skills are required for the operation subject to the contract; (7) whether they have a proprietary interest in the work in which they are engaged; and (8) whether they have the opportunity to make decisions which involve risks taken by the independent business person which may result in a profit or loss. *Metro Cars*, 309 NLRB 513, 515 (1992); *Standard Oil Co*., 230 NLRB 967, 968 (1977); *NLRB v. Pepsi Cola Bottling Co*., 455 F.2d 1134, 1141 (6th Cir. 1972). This analysis also includes an examination of the ''entrepreneurial risk'' undertaken by the party performing the service and the method of compensation and tax withholding. *NLRB v. United Insurance Co.*, 390 U.S. 254 (1968); *Diamond L Transportation*., 310 NLRB 630, 632 (1993); *Metro Cars*, supra at 515, *Cardinal McCloskey Services*, 298 NLRB 434 (1990).

In the instant case, Respondent has not provided enough evidence to support its contention that the van and limousine drivers were independent contractors. The inadequate bits and pieces provided by Respondent in the record, in fact, supports just the opposite.[4] First, driving assignments and referrals were given to the van and limousine drivers via the reservationists and the dispatchers. When a customer request was made, a ''key card'' was created by the reservationists and subsequently given to the dispatcher, who used that card to assign different vehicles to those particular jobs. The fact that the employer controlled the assignments of each driver shows that the drivers did business for the company with assistance and guidance from company personnel and had no input in these decisions.

LoDestro went on, ''I'm very familiar with unions. I was the president of a union myself and all they want is your money, they don't want anything else, they're not out for your interest.'' Iuzzolino spoke up, ''I too am very familiar with unions, I've been a union member, and I'm not saying unions are the answer to all of our problems, but at this stage of the game we need representation.'' At this LoDestro shook his head, in disapproval of Iuzzolino's remarks, and the meeting went on to other areas.

Second, the record shows that some drivers leased vans and limousines from the Respondent while others owned and operated their own equipment. Respondent admits that many of the vans and limousines, whether leased or owner-operated, were serviced by the Respondent's mechanics. Re-

[4] In this connection it noteworthy that in R. Br. at 35, fn. 20, Respondent appears to rely on an off-the-record discussion to support its contention, in which it is alleged the Union stated it was not taking the position that the van and limousine drivers were statutory employees.

spondent also says that it had no control over where the owner-operators had their vehicles repaired, but that they could come to its shop if they so choose. The record does not reflect who paid for the mechanical services when the owner-operators had their vehicles repaired by Respondent. Respondent even had three mechanics that worked exclusively on vans and limousines. The drivers only had to fill out discrepancy slips in order to have all their automobile serviced. Although it is unclear who was ultimately responsible for the maintenance and repairs of the vans and limousines, Respondent certainly provided sufficient facilities to cover such interests.

Third, the record shows that Respondent controlled the hiring and firing of van and limousine drivers. For instance, after an applicant was interviewed and subsequently hired by Respondent, the new driver would be given a 2-day training course by an experienced driver. Respondent's dispatchers were also given the authority to suspend or fire drivers. This shows that Respondent had a disciplinary system as to van and limousine drivers.

Although the record is inadequate as to the issue of independent contractor/employee status of van and limousine drivers, it is clear that Respondent exercised substantial control over the daily activities of the drivers. They were hired, fired, supervised, and given assignments by Respondent. Furthermore, Respondent had three mechanics who repaired vans and limousines.

Based on all of the above, Respondent has not met its burden of proof in claiming independent contractor status for van and limousine drivers. As such, the drivers were employees of Respondent and not independent contractors. With regard to the status of Danny Mullen, he was a supervisor of nonbargaining unit employees of Respondent, and as such, he should have been excluded from the bargaining unit, and ineligible to vote in the representation election. *Detroit College of Business*, supra at 321.

E. *The Motion to Disqualify*

Along with its posttrial brief, Respondent also filed an affidavit in support of Motion to Disqualify Administrative Law Judge seeking my removal from the case on the basis that my conduct in presiding over the hearing created the appearance of bias against Respondent. Counsel for the General Counsel filed a letter in opposition to the motion.

Respondent's counsel first refers to his earlier oral motion that I disqualify myself during the third day of hearing. Counsel objected to my sustaining objection to his question of a General Counsel witness on cross-examination which I ruled exceeded the scope of the direct examination and my refusal, in the exercise of my discretion, to permit counsel to examine the witness as a Respondent witness at the time. The interchange that took place with counsel and my later ruling denying the refusal appears at Transcript 730 to 739. In making his motion, Respondent counsel showed a significant misunderstanding of the rules of evidence which governs the presentation of evidence in unfair labor practice proceedings and in the role of the administrative law judge in regulating the course of the hearing, including requesting the parties at any time during the hearing to state their respective positions concerning any issue in the case or theory in support thereof under Section 102.35, subsections (f), (k), and (l) of the Board's Rules and Regulations. In particular, I deemed it appropriate and well within the bounds of subsection (l) to require Respondent counsel to state his client's position and its knowledge of alleged discriminatee Anthony Iuzzolino's union activities in light of both Iuzzolino's and other witnesses' testimony and, in particular, counsel's cross-examination of Iuzzolino which resulted in a reiteration and reaffirmation of his direct testimony attributing such knowledge to Respondent's agents. Respondent counsel's statements that he never had a situation where he had seen an objection beyond the scope sustained in an NLRB hearing is extraordinary and implausible. His later statements that he was under no obligation to tell me what his case is going to be was both nonresponsive and evidenced a serious lack of knowledge of the powers and responsibilities of the administrative law judge in controlling the hearing and his responsibilities in appropriately responding. Respondent counsel is also mistaken when he claims disparate treatment in claiming I was short with delays occasioned by Respondent counsel and representatives' tardiness in attending the hearing timely, and refused to permit Respondent Counsel to leave the hearing room but granted such leave to counsel for General Counsel. As is confirmed by General Counsel and union counsels' comments on the record and confirmed in General Counsel's letter, no such break was ever permitted or sought by General Counsel. Furthermore, my comments about Respondent's tardiness was direct, to the point, and nonthreatening. (Tr. 1009, 1242.) If Respondent claims any of my remarks in this regard were made off the record, it was incumbent on its counsel immediately to request they be made of record and to make a timely objection and move my disqualification, none of which was done. See *Pioneer Natural Gas Co*., 253 NLRB 17 fn. 2 (1980).

Although denied the opportunity to examine the government witness, Edward LaPetina, as his own while LaPetina was on the witness stand undergoing cross-examination, I permitted the witness to be called as Respondent's first witness in the presentation of its defense, over union counsel's objection, as soon as the General Counsel had rested his case-in-chief, later the same day. (Tr. 747.) Thus, Respondent was able to achieve its objective of examining Edward LaPetina without any delay in the proceeding and without the necessity of issuing him a subpoena.

My evidentiary rulings with respect to alleged discriminatee Robert Molaro's cross-examination were proper and, in particular, sought to balance appropriately the prejudice or harm which could result from the disclosure of names of employee union card signers against the need for the disclosure of information in furtherance of Respondent's rights to cross-examine witnesses. See *Committee on Masonic Homes v. NLRB*, 556 F.2d 214 (3d Cir. 1977), and *NLRB v. Robbins Tire & Rubber Co*., 437 U.S. 214 (1978). That balancing process has recently been the subject of Board scrutiny, in *National Telephone Directory Corp*., Case 22–CA–19067 et al., in which the Board by unpublished Order dated October 7, 1994, granted counsel for General Counsel's and charging party's requests for special permission to appeal the administrative law judge's ruling requiring production of all authorization cards or in the alternative requiring witnesses to reveal the identities of employees who signed authorization cards, attended union meetings, or otherwise engaged in union activities, and, on appeal, reversed and vacated the administrative law judge's rulings.

In furtherance of this balancing process, I required both Molaro and Iuzzolino to disclose the names of employees they solicited and the circumstances of their solicitations and those employees who they recalled executed union cards at their behest. When those cards were requested by Respondent they were provided for its inspection. Respondent counsel did not request all cards solicited by Molaro. I refused to permit Respondent counsel to receive or examine all cards received by Local 282 or Local 804, but, I did, with the agreement of all counsel, examine Local 282 cards in camera and read their dates of signing into the record. (Tr. 604, 678.) Subsequent to an extended recess in the cases, which permitted me to examine the record, and consistent with my position on card disclosure and production, I reversed a prior ruling and now disclosed the identity of card signers solicited by Iuzzolino, directed the production of their cards, and permitted further cross-examination of Iuzzolino with respect to them. (Tr. 1009.)

The reference in Respondent counsel's affidavit to my assistance rendered to counsel for General Counsel refers to a request to government counsel to inform me whether, in light of the record evidence to date he was claiming a discriminatorily denial of work for Iuzzolino prior to the date of discharge alleged in the complaint. (Tr. 458–459.)[5] This request of General Counsel was made under my authority set forth in Section 102.35(k) and (l) of the Board's Rules and Regulations. See also *Teamsters Local 722 (Kasper Trucking)*, 314 NLRB 1016, 1017 (1994), when the Board states: ''Further, it is well settled that judge's may examine witnesses or interrupt questioning in order to clarify testimony or develop the record. *NLRB v. Overseas Motors*, 818 F.2d 5l7, 520 (6th Cir. 1987); *NLRB v. Top Form Mills*, 789 F.2d 262, 265 (4th Cir. 1986).''

Respondent counsel is also incorrect in attributing to union Counsel rather than to me the evidentiary rulings appearing at Transcript 990–991 and 995. I correct Transcript 991, lines 12 to 14, since clearly I made this ruling and not union counsel, where name improperly appears as the speaker at these lines. It is my ruling which appears at Transcript 995, line 13–14. Mr. Gordon, union Counsel's, use of the phrase ''but admit it'' at line 11, while inartful, clearly signifies he is not objecting to my receiving the hearsay testimony, not for its truth, but for the witnesses' state of mind. I saw no reason to correct his phraseology at the time, and Mr. Gringer's seizing on this ruling is nitpicking to an extreme degree, as is his reference to my ruling at Transcript 998–999 where I properly sustained an objection to a Respondent witnesses' description of a company rule without laying a proper foundation for its admission.

My denial of Respondent's motion to amend its answer during the hearing to now deny its issuance of written warnings to alleged discriminatee Molaro was well within my discretion, particularly since Respondent's conduct in fabricating these warnings played a central role in my conclusions regarding Respondent's animus and discriminatory motive toward Molaro.

[5] Respondent counsel's erroneous reference is to Tr. 625, where I also requested counsel for the General Counsel to clarify the allegation in par. 15 of the consolidated complaint which claims a discriminatory reduction in employee Iuzzolino's seniority.

Respondent counsel's claim that I should have permitted receipt into evidence of a lengthy unemployment hearing transcript further burdening the record instead of requiring him, as I did, to identify those portions which constituted either admissions or prior inconsistent statements of the witness, is wrong as a matter of law and illustrates that he is seeking to create a claim of prejudice and bias out of whole cloth, out of what in essence are proper evidentiary rulings which somehow offended Mr. Gringer or his client's sensibilities.

I will not dignify a response to other unsubstantiated claims of a scurrilous nature, but refer to counsel for the General Counsel's response to one of them. My participation in the prior proceeding alluded to by Respondent counsel, *Long Island Transport*, Case 29–CA–14285, involving a Section 8(a)(3) discharge, was settled by way of an out-of-Board adjustment in May 1990, and a closing order issued on June 8, 1990, thereby avoiding litigation of Respondent's general defense that its limousine and van drivers were independent contractors. Mr. Schoolman, owner and president, was represented by counsel and all settlement discussions were held jointly with them, General Counsel, and the alleged discriminatee. The adjustment, resulting in the payment of a $6000 amount to the Charging Party and his withdrawal of the charge, was voluntary and freely entered by all parties, with the approval of counsel for the General Counsel, and effectuated the purposes of the Act. The wisdom of Mr. Schoolman reserving that defense has been established in this proceeding where the weight of the available evidence shows the probable legal inadequacy of Respondent's claim that its limousine and van drivers are not statutory employees.

Respondent counsel's reliance on the citation of cases appearing at page 9 of his affidavit is misplaced as these cases are clearly distinguishable, each involving administrative law judge conduct significantly different in kind, showing a prejudgment and bias toward one of the parties to the proceeding before him, none of which appears on this record.

I categorically reject Respondent counsel's assertions that I exhibited an appearance of bias or prejudice toward him or his client, and firmly deny its motion.

CONCLUSIONS OF LAW

1. Respondent Schoolman Transportation System, Inc., d/b/a Classic Coach, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 804, International Brotherhood of Teamsters, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating its employees concerning their membership in, activities on behalf of, and sympathy for, the Union, warning and directing employees to cease engaging in activities on behalf of the Union, threatening employees that they would be discharged because of their support for the Union, soliciting grievances from employees and promising to resolve them if said employees rejected the Union, creating the impression that their union activities are being kept under surveillance, directing its employees to tell other employees to cease their union activities, threatening its employees that a strike would be inevitable if they selected the Union as their collective-bargaining representative, and by offering its employees unspecified financial benefits as an inducement to vote against representation by the Union at an

election to be conducted by the National Labor Relations Board, the Respondent has interfered with, restrained, and coerced its employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act.

4. By issuing written warnings to, and discharging, employee Robert Molaro and by reducing the seniority of, and discharging, employee Anthony Iuzzolina because of their membership in and activities on behalf of the Union, the Respondent has been discriminating in regard to the hire or tenure or terms and conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(3) and (1) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative actions which are necessary to effectuate the policies of the Act.

I shall recommend that Respondent offer Robert Molaro and Anthony Iuzzolino reinstatement to their former positions or, if no longer available, to substantially equivalent positions, including restoration of Iuzzolino's seniority date of June 24, 1991, without prejudice to their seniority and other rights and privileges, and make them whole for any loss of earnings and other benefits they may have suffered as the result of Respondent's unlawful discriminations against them. Such amounts shall be computed in the manner prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), and shall be reduced by net interim earnings, with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[6] I shall also recommend that Respondent expunge from its files any references to Molaro's written warnings, Iuzzolino's reduction of seniority, and to their unlawful discharges, and notify the employees in writing that this has been done and that these acts will not be used against them in any way.

Having concluded that the challenge to Robert Molaro's ballot be set aside and the challenge to Dan Mullen's ballot be sustained, I shall recommend that Molaro's ballot be opened, a revised tally of ballots be issued, and if, as a result, the Union should have won the election, a certification of representative issue to the Union. If the Petitioner should lose the election based on a revised tally of ballots, I recommend that the election be set aside and a rerun election be ordered.

On the findings of fact and conclusions of law, and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, Schoolman Transportation System, Inc., d/b/a Classic Coach, Bohemia, New York, its officers, agents, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees concerning their membership in, activities on behalf of, and sympathy for, Local 804, International Brotherhood of Teamsters, AFL–CIO, or any other labor organization, warning and directing employees to cease engaging in such membership and activities, threatening employees that they would be discharged because of their support for the Union, soliciting grievances from employees and promising to resolve them if said employees rejected the Union, creating the impression that their union activities are being kept under surveillance, directing its employees to tell other employees to cease their union activities, threatening its employees that a strike would be inevitable if they selected the Union as their collective-bargaining representative, and offering its employees unspecified financial benefits as an inducement to vote against the Union at an election to be conducted by the National Labor Relations Board.

(b) Discouraging membership in Local 804, International Brotherhood of Teamsters, AFL–CIO, or any other labor organization, by issuing written warnings, reducing seniority, discharging or otherwise discriminating against its employees in regard to their hire or tenure of employment or any term or condition of employment.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Restore Anthony Iuzzolino's original seniority date and offer Robert Molaro and Anthony Iuzzolino immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful written warnings to Robert Molaro, the unlawful reduction in Anthony Iuzzolino's seniority, and the unlawful discharges of both employees and notify them in writing that this has been done and that these actions will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Bohemia, New York facilities, copies of the attached notice marked ''Appendix.''[8] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees, are customarily posted. Reasonable steps shall be taken by the

[6] Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED in Case 29–RC–8087, that the challenge to the ballot of Dan Mullen be sustained and that the challenge to the ballot of Robert Molaro be overruled and that such ballot be opened and tallied with the count of other ballots already made and that a revised tally of ballots be issued and served on the parties, and that if the resulting votes for representation by the Union constitute the majority of the ballots cast in the February 9 and 11, 1993 election, that the appropriate certification of exclusive collective-bargaining representative be issued. If the ultimate tally of ballots is not to such effect, Objections 2, 4, and 6 will be sustained, the election held on February 9 and 11, 1993, will be set aside, and a rerun election will be ordered.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate our employees concerning their membership in, activities on behalf of, and sympathies for, Local 804, International Brotherhood of Teamsters, AFL–CIO, or any other labor organization, warn and direct employees to cease engaging in such membership and activities, threaten employees that they would be discharged because of their support for the Union, solicit grievances from employees and promise to resolve them if said employees rejected the Union, create the impression that their union activities are being kept under surveillance, direct our employees to tell other employees to cease their union activities, threaten our employees that a strike would be inevitable if they selected the Union as their collective-bargaining representative, and offer our employees unspecified financial benefits as an inducement to vote against the Union at an election to be conducted by the National Labor Relations Board.

WE WILL NOT discourage membership in Local 804, International Brotherhood of Teamsters, AFL–CIO, or any other labor organization, by issuing written warnings, reducing seniority, discharging or otherwise discriminating against our employees in regard to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL reinstate Anthony Iuzzolino's original seniority date and WE WILL offer Robert Molaro and Anthony Iuzzolino immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL remove from our files any reference to the unlawful warnings, reduction in seniority and discharges, and notify Robert Molaro and Anthony Iuzzolino in writing that this has been done and that this action will not be used against them in any way.

SCHOOLMAN TRANSPORTATION SYSTEM, INC.
D/B/A CLASSIC COACH